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ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed January 5, 1982)

John R. Harris and Ruthetta Harris, Plaintiffs-Appellants and Cross-Appellees, v. Research Federal Credit Union, Defendant-Appellee and Cross-Appellant, and Eugene Ostrowe and Karen Ostrowe, Plaintiffs-Appellants and Cross-Appellees, v. Dearborn Federal Credit Union, a Federal Credit Union, Defendant-Appellee and Cross-Appellant. Nos. 80-1448 & 80-1621.

Before: Engel, and Kennedy, Circuit Judges; and Celebrezze, Senior Circuit Judge.

Appellants, plaintiffs, below, brought this suit under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (TILA), and Regulation Z passed thereunder, 12 C.F.R. § 226 *et seq.* They appeal the District Court's decision denying their motion to certify the class. They also appeal the court's decision that a husband and wife who sign a note as co-makers are only entitled to one statutory penalty. Cross-appellants, defendants below, appeal the court's determination that they violated Regulation Z by failing to make certain disclosures. We hold that defendants did not violate the Act or Regulation Z. Accordingly, we reverse the judgment of the District Court without reaching the questions presented by plaintiffs.

Plaintiffs secured loans from the Research Federal Credit Union and the Dearborn Federal Credit Union several years ago. The security agreements contained acceleration clauses providing:

> Upon such defaults and at any time thereafter secured party may declare all obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the Uniform Commercial Code.

These acceleration clauses were not disclosed in the disclosure statements. The non-disclosure complied with Official Staff Interpretation No. FC-0054, 42 F.R. 18056 [1974–1977 Transfer Binder] Cons. Cred. Guide (CCH) § 31,552, Apr. 4, 1977, which stated that the right to accelerate need not be disclosed under 12 C.F.R. § 226.8 (b) (4). Nonetheless, relying on *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), the District Court held that the disclosure statements violated the Regulation because they failed to disclose the consequences of acceleration on unearned interest.

After the District Court's decision in this case, the Supreme Court decided *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). In that case the Court was faced with an acceleration clause identical in all relevant respects to the clause at issue here. The Court rejected the reasoning in *St. Germain*. It held that neither the TILA nor the regulations passed thereunder clearly controlled the disclosure of acceleration clauses. In the absence of a clear expression one way or the other, the Court reversed the Ninth Circuit for failing to defer to the Federal Reserve Board's interpretation stating that disclosure is not required. Under *Milhollin* it is clear that defendants in this case did not violate the TILA or Regulation Z by failing to disclose any aspects of the acceleration clauses in the disclosure statements.

The District Court found another violation of Regulation Z. The disclosure statements on the loans contained the following language:

> Security agreement will secure future or other indebtedness, and after-acquired property.

M.C.L.A. § 440.9204 (4) (b) provides:

> No security interest attaches under an after-acquired property clause to consumer goods other than accessions when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.

The District Court found that the disclosure statements violated Regulation Z because they did not disclose the ten-day limitation on after-acquired property.

The rationale of *Milhollin* compels the conclusion that defendants did not violate the Act or Regulation by failing to disclose the ten-day limit on after-acquired property. Federal Reserve Board Staff Letter #983, dated December 30, 1975, states as follows:

> In Staff's opinion, it would be sufficient, in disclosing an after-acquired property clause under 226.8 (b) (5), to state simply that the security interest covered such property, without further describing the manner and conditions under which the interest attaches. We believe that this would comply with the relevant provisions of the section, which requires that the creditor clearly set forth the *fact* that after-acquired property will be subject to the security interest. (Emphasis in original).

As the Supreme Court stated in *Milhollin*, '[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive..." 444 U.S. at 565. Neither the Regulation nor the Act clearly state whether the ten-day limit must or must not be disclosed. The staff opinion here was in effect at the time of trial and is clearly not irrational. After the trial in this case the Federal Reserve Board changed the disclosure requirements relating to after-acquired property clauses, but

this change alone does not render the otherwise rational staff opinion irrational. Accordingly, it was error for the District Court to rule contrary to the staff opinion.

The judgment of the District Court is reversed and the case remanded for entry of judgment in favor of defendants.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
Clerk

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals
For the Sixth Circuit)

(Filed April 22, 1982)

John R. Harris and Ruthetta Harris, Plaintiffs-Appellants and Cross-Appellees, v. Research Federal Credit Union, Defendant-Appellee and Cross-Appellant; and Eugene Ostrowe and Karen Ostrowe, Plaintiffs-Appellants and Cross-Appellees, v. Dearborn Federal Credit Union, a Federal Credit Union, Defendant-Appellee and Cross-Appellant. Nos. 80-1448, 80-1621.

Before: ENGEL AND KENNEDY, Circuit Judges; and CELEBREZZE, Senior Judge.

Upon consideration of the petition for rehearing, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
Clerk

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

John J. Harris and Ruthetta Harris, husband and wife, Ind., and on behalf of others similarly situated, Plaintiffs, v. Research Federal Credit Union, Defendant. Eugene Ostrowe and Karen Ostrowe, husband and wife, Ind., and on behalf of others similarly situated, Plaintiffs, v. Dearborn Federal Credit Union, Defendant. Civil Nos. 5-72553, 5-72554.

IV. Does defendants' failure to disclose that after-acquired property is subject to a security interest only if acquired within 10 days of the security agreement's attaching violate the TILA?

The instant disclosure statements contain the statements: "Security Agreement will secure future or other indebtedness, and cover after-acquired property." The plaintiffs claim this disclosure violates 12 C.F.R. § 226.8 (b) (5) which requires:

> A description or identification of the type of any security interest held *or to be retained or acquired by the creditor* in connection with the extension of

> credit, and *a clear identification of the property to which* the security interest relates...If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired. (emphasis added)

Plaintiffs argue that because M.C.L.A. 440.9204 (4) (b) limits a security interest in after-acquired property to property acquired within 10 days of the secured party (the creditor) giving value, the disclosure provided in this case is not full and meaningful.

Plaintiffs also claim that the above-described arrangement does not disclose with sufficient particularity the property covered by the "after-acquired" clause. In view of my conclusion with respect to the first issue, this question is not reached.

Case law firmly supports the plaintiffs' argument that the 10-day limitation should have been disclosed. Defendants violated the TILA in this respect.

In *Ecenrode v. Household Finance Corp. of South Dover,* 422 F. Supp. 1327 (E. Del. 1976) the challenged disclosure statement stated that the security agreement "may cover after-acquired property". Delaware has adopted § 9-204 (4) (b) of the U.C.C., as has Michigan. Thus, under Delaware law a creditor may only acquire an interest in those after-acquired good which the debtor acquires within 10 days of the secured party's giving value. The court held the disclosure statement violated § 226.8 (b) (5) and 226.6 (c). Quoting *Johnson v. Associates Finance, Inc.,* 369 F. Supp. 1121 (S.D. Ill. 1974), the court stated:

> The challenged provision fails to clearly and accurately define the extent of the defendant's security in-

terest and seems almost patently designed to mislead and confuse the borrower in that regard. 422 F. Supp. at 1331.

The rationale for this rule was explained in *Pollock v. General Finance Corp.*, 535 F.2d 295, 297 (5th Cir. 1976), *cert. denied*, 434 U.S. 891 (1977) as the desire that the borrower be informed " that any consumer goods that he may acquire within 10 days of the loan transaction are subject to the security interest and that any consumer goods acquired after that date are not."

The seeming paradox in requiring a lender to disclose the 10-day limit lies in the fact that the instant disclosure seems to go further than the law requires, in effect "over-warning" the consumer. On inspection this problem evaporates. The purpose of the Act is *accurate* disclosure so that consumers may more intelligently weigh various credit alternatives and thus allocate society's resources in a way which more closely approximates consumers' true desires as reflected in the credit marketplace. Misinformation leads to misallocation. Moreover, where a disclosure asserts a greater interest than is actually possessed there is potential for abuse by creditors who may coerce or influence debtors who in their ignorance believe the security interest valid.

Defendants rely upon Federal Reserve Board Opinion Letter No. 983 of 12/30/75, reprinted in 5 CCH Consumer Credit Guide ¶31,323 for the proposition that the disclosure of a security interest in after-acquired property may be effected by "simply stating that the security interest cover[s] such property without further describing the manner and conditions under which the interest attaches." However, in *Murphy v. Beneficial Finance Co. of Central Ohio*, 443 F. Supp. 463, 466-8 (S.D. Ohio 1976) Judge Duncan rejects this argument with some perceptive analysis. He observes that the statute, 15 U.S.C. § 1639 (a) (8) and the regulation, 12 C.F.R. § 226.8 (b) (5) require *two* separate disclosures: a description of any security involved *and* a clear identification of the pro-

perty to which it relates. The last sentence of § 226.8 (b) (5) concerns only the first disclosure. There is a separate duty to describe the *property affected* which FRB Letter No. 983 unjustifiably overlooks. Such a generalized disclosure does not clearly inform the borrower of the property covered.

In accord with this holding under a variety of circumstances: *Bartlett v. Com'l Federal S. & L. Ass'n, of Omaha,* 433 F. Supp. 284, 286 (D. Neb. 1977); *Pollock v. General Finance Corp.,* 535 F.2d 295, 299 (5th Cir. 1976), *aff'd on rehearing,* 552 F.2d 1142, 1144-5 (5th Cir. 1977); *Willis v. Town Fin. Corp. of Atlanta,* 416 F. Supp. 10, 11-13 (N.D. Ga. 1976); *Sneed v. Beneficial Fin. Co. of Hawaii,* 410 F. Supp. 1135, 1138-45 (D. Ha. 1976); *In re Dunne, 407 F. Supp. 308, 311 (D. R.I. 1976); Tinsman v. Moline Beneficial Finance Co.,* 531 F.2d 815, 819 (7th Cir. 1976); *Cadmus v. Commercial Credit Plan, Inc.,* 437 F. Supp. 1018, 1020 (D. Del. 1977)

VI. *The Acceleration Clause*

Paragraph 10 of the instant security agreements provides:

> Upon such defaults and at any time thereafter secured party may declare all obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the Uniform Commercial Code.

Plaintiffs urge that this should have been disclosed to the borrowers under either 12 C.F.R. § 226.8 (b) (4) or (7). Section 226.8 (b) (4) provides that in any transaction subject to that section "[t]he amount, or method or computing the amount, of any default, delinquency, or similar charges payable in the event of late payments" shall be disclosed to the consumer. Section 226.8 (b) (7) requires the

> [i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full...If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

This first question to be decided is which of these two regulations is applicable here. Many courts have addressed the question of whether an acceleration right should be disclosed by attempting to determine whether a right of acceleration amounts to a "charge payable" within the meaning of § 226.8 (b) (4). There have been contradictory results.

The most consumer-oriented of the approaches which have developed is best described in *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972). There the court reasoned that the common legal meaning of a "charge" is any burden or obligation on the debtor. The court concluded that because the purpose of the TILA is full and meaningful disclosure of all information relevant to the decision as to where to purchase credit, the right of acceleration should have been disclosed.

This case has enjoyed considerable support but it suffers from one fatal flaw: its result is not in harmony with the language of the statute and regulations. Had Congress desired to give the word "charge" such a broad meaning, it would have been more explicit. Instead, it apears that in this statute the word "charge" refers to specific monetary amounts, and thus, under the principle of *ejusdem generis*, that is the meaning it must have. The *Garza* decision is laudable in its motive but amounts to judicial legislation.[4]

Other courts have gone to the other extreme and held that "in the absence of a regulation requiring it, failure to disclose an acceleration clause and the lender's rebate policy with respect thereto in an installment credit transaction does not give rise to a claim for statutory damages." *Martin v. Commercial Securities Company*, 539 F.2d 521, 529 (5th Cir. 1976), *rev'd* in *McDaniel v. Fulton National Bank of Atlanta*,

571 F.2d 948 (5th Cir. 1978); *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977).

Yet a third group of cases has adopted the position that an acceleration clause need only be disclosed if the credit contract does not by its terms provide that the unearned portion of the finance charge is refunded. See cases cited in *St. Germain v. Bank of Hawaii*, 573 F.2d 572, 575 (9th Cir. 1978). Other courts have held alternatively that if the clause authorizes the creditor to collect unearned interest then the acceleration does impose an additional charge and that fact must be disclosed under § 226.8 (b) (4). *Chapman v. Rhode Island Hospital Trust Nat'l Bank*, 444 F. Supp. 439, 445 (D. R.I. 1978).

This analysis has introduced a complicating factor in some cases which have held that although an acceleration clause may purport to authorize the collection of unearned interest, or may be ambiguous in that regard, if the state law applicable to the transaction requires the refund of unearned interest, then the acceleration clause is vitiated insofar as it imposes a "charge" and thus the acceleration need not be disclosed. The theory of these cases seems to be that the law of the state becomes a part of the credit contract, overriding the contrary position taken by the document itself. *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 268 (3rd Cir. 1975); *see also St. Germain, supra*, at 575.

It was the former branch of this third approach which was taken by former Chief Judge Keith in *Vega v. First Federal Sav. & L. Ass'n of Detroit, supra*. In that case Judge Keith held that the acceleration clause need not have been disclosed with the following rationale.

> [t]he Court is persuaded by the fact that activation of the acceleration clauses will result only in the acceleration of earned interest and will not result in payment of additional monies by the borrower nor in a windfall for the creditor. The Court is, therefore, of the opinion that the lender's right of acceleration is

> not a charge payable in the event of late payments, and while this Court is of the opinion that because of its significance to the buyer, the lender's right acceleration should be disclosed, the requirement of disclosure is properly a legislative function. As the statute and regulations are presently written, this Court finds no mandate for disclosure. 433 F. Supp. at 631.

I am reluctant to differ with Judge Keith but in this case I feel I must. Since the opinion in *Vega* was written two circuit courts of appeals have adopted an approach to the issue at hand which is both more persuasive and more consonant with the purposes of the TILA than any other I have encountered. Moreover, neither of these opinions was in effect at the time *Vega* was issued and thus Judge Keith did not have the benefit of their analysis to guide him as I do.

A well reasoned and analytical opinion is the *St. Germain* case mentioned earlier. That case begins with the observation that those cases which attempt to deal with the acceleration problem by searching for a "charge" under § 226.8 (b) (4) are beset with problems. The *Garza* approach runs afoul of the language of the statute and regulations, amounting to judicial legislation. The cases at the other extreme which hold that the right to accelerate is merely a remedy are far too narrow in their conception of the TILA's purpose which is to shift the emphasis in the credit marketplace from "let the buyer beware" to "let the seller disclose." Moreover, those cases proceed to their conclusions on the slender reed of legislative silence on the question at hand. Those cases which adopt the intermediate approach are likewise not remedial in that they result in the creditor being able to fail to disclose material and important information: namely, the fact of the acceleration clause itself. In those situations where the existence of a state law requirement that unearned interest be refunded is determinative of the validity of the acceleration clause, a "morass of conflicting and uncertain state law" is built into the TILA.

St. Germain, supra, at 575. (See cases cited there for examples of this problem.) And although the court in *St. Germain* does not make this observation, it seems that the disclosure requirements of the Act are subverted if the consumer must refer to state statutory materials in order to ascertain the material facts concerning his credit purchase.

The analysis in *St. Germain* proceeds with the observation that on several occasions the Federal Reserve Board has stated that acceleration is essentially the same as a forced prepayment of the balance of the loan. See Federal Reserve Board Official Staff Letter No. FC-0054, reprinted in 5 CCH Consumer Credit Guide ¶31,552 (3/21/77). This being so, the logical conclusion is that the disclosure requirements of § 226.8 (b) (7) ought to apply to acceleration clauses in the same manner as to prepayment provisions. As the court in *St. Germain* noted:

> The prepayment concept leads directly to the conclusion that the effect of the acceleration clause on unearned interest must be 'meaningfully disclosed in the disclosure state', a result which is consistent...with the overriding purposes of Congress in enacting TILA. 573 F.2d at 576.

The result which flows from this conclusion is that the defendants here have violated the TILA because they failed to disclose either that upon acceleration the unearned interest would not be refunded or the method for calculating the amount of the refund, whichever is applicable to the case at bar.

The virtue of the approach adopted in both *St. Germain,* and, in more abbreviated form in *McDaniel,* is that it hews to the Federal Reserve's own interpretation of acceleration as being, in essence a prepayment, while avoiding the textual shoals upon which the *Garza* line of cases foundered. This approach also preserves the laudatory aim of *Garza;* full disclosure of all of the information that one would desire in

carrying out an informed credit purchase. And finally, it appears that this approach may hopefully gain the wide acceptance which is necessary to the effective enforcement of this statute and put an end to the anarchy on this issue which has been but briefly detailed herein.'

VII. Is the affirmative defense under 1640 (f) available to the defendant?

Section 1640 (f) provides:

> No provision of this section...imposing liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation or interpretation by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined...to be invalid for any reason.

Defendants claim that should any violation of the TILA be found, they are absolved by § 1640 (f) because "at all times herein [they] acted in good faith [reliance] and in conformity with the rules, regulations and interpretations of the Federal Reserve Board. There has been absolutely no evidence or testimony to the contrary." (Defendants' Supplemental Memorandum, p. 6)

Defendants misconceive the nature of an affirmative defense. There is no evidence here which shows that the defendants *did* rely upon regulations, rules or interpretations promulgated by the Federal Reserve Board in drafting the instant disclosures. Clearly, the burden of producing evidence of reliance is on the defendants because: they have the affirmative of the issue; the matter is crucial to the defendants' case; defendants have peculiar knowledge of whether they relied on rules, etc.; and, defendants must plead the issue.

See R. Field & B. Kaplin, Civil Procedure (3rd ed. 1973), p.457.

The cases agree. In *Gillard v. Aetna Finance Co., Inc.*, 414 F. Supp. 737, 749 (E.D. La. 1976) the court wrote:

> To avoid liability, the defendant also relies on 15 U.S.C. § 1640 (f), but has not directed our attention to any rule, regulation or Board interpretation to which it has attempted to conform in drafting the particular language in the disclosure statement which we have found to be misleading. Thus, the defendant has not sustained its burden of proof and, therefore, has not shown that it is entitled to take advantage of the section 1640 (f) defense.

See also *Houston v. Atlanta Federal Sav. & Loan Ass'n*, 414, F. Supp. 851, 859 (N.D. Ga. 1976) (which limits the § 1640 (f) defense to cases where a disclosure statement, prepared in accordance with valid rules or regulations later becomes invalid because the underlying rule or regulation is no longer valid); *Ives v. W.T. Grant Co.*, 522 F.2d 749, 758 (2d Cir. 1975). Thus, § 1640 (f) is unavailable to defendants.

VIII. Each Spouse Should Not Recover The Full Statutory Amount

Both husband and wife are liable on the instant notes. In each case both signed as co-makers. See M.C.L.A. §§ 440.3414 & 3415 (a). Plaintiffs assert that for this reason each marriage partner should recover separately.

As plaintiffs note, the courts are split on this issue. In *Mirabel v. General Acceptance Corp.*, 537 F.2d 871, 881-3 (7th Cir. 1976) the court concluded that because the duty to disclose runs to *each* obligor in a loan transaction, 15 U.S.C. § 1640 (a), each should recover separately. *Accord, Berryhill,*

v. Rich Plan of Pensacola, 578 F.2d 1092, 1100 (5th Cir. 1978).

Other cases have drawn a distinction between situations in which a right to rescind exists under 15 U.S.C. § 1635 and those which do not, allowing double recovery in the former because under 12 C.F.R. §§ 226.6 (e) and 226.603 multiple disclosures are required. *See Simmons v. American Budget Plan, Inc.,* 386 F. Supp. 194, 201 (E.D. La. 1974); *Gillard v. Aetna Finance Co., supra,* at 749. *Compare: Powers v. Sims and Levin,* 542 F.3d 1216 (4th Cir. 1976).

However, I do not predicate the refusal to award two recoveries upon that basis. *Mason v. General Finance Corp. of Va.,* 542 F.2d 1226, 1235 (4th Cir. 1976). In *St. Marie v. Southland Mobile Homes, Inc.,* 376 F. Supp. 997, 998 (E.D. La. 1974) the court denied double recovery on the theory that husband and wife purchase, financed and received disclosure as a family unit rather than a two separate debtors. A better reason is set forth in *Powers v. Sims and Levin, supra,* at 1219.

> ...[the two-recovery approach] neglects the fact that there was but one credit transaction, and the plaintiffs were joint obligors of that joint obligation. The Congress was careful to provide a maximum to the statutory penalty, and it is not to be lightly supposed that that statutory maximum is to be doubled, trebled, or quadrupled, depending upon the number of the joint obligors in a single consumer credit transaction. That we should treat husband and wife, when joint oligors, as one is indicated by the legislative history. In House Report Number 1040 it is stated:
>
> > 'Any creditor failing to disclose required information would be subject to a civil suit with a penalty equal to twice the amount of the finance charge, with a minimum penalty of $100 and a maximum penalty not to exceed

> $1,000 on *any individual credit transaction.*' 1968 U.S. Code Cong. and Adm. News p. 1976. [emphasis supplied in original]

Moreover, even the remedial purpose of the TILA does not mandate double recovery. The statutory maximum on damages is so low as to imply that Congress was not so much concerned with redress as with encouraging disclosures. *See Hinkle v. Rock Springs Nat. Bank,* 538 F.2d 295 (10th Cir. 1976) (no actual damages needed to recover). This rationale is as well served by single as double recovery. *See In re Dunne, supra,* 407 F. Supp. 308 (D. R.I. 1976) In addition, there is no need for larger recovery to promote the bringing of suits; the attorney-fee provision of 15 U.S.C. § 1640 (a) (3) accomplishes that.

Finally, it should be noted that the problems foreseen by some courts if double recovery is not allowed are not present here. There is no evidence that the lenders actually received extra security from the co-obligors in a meaningful sense, nor is this a case where only one of two co-obligors sues, thus leaving open the possibility of another suit by the non-suing party. See *Mirabel v. General Acceptance Corp., supra.*

[4] Some cases have adopted an approach closely related to *Garza* by requiring disclosure of an acceleration clause under the Act's general requirement of "meaningful disclosure". See *Burley v. Bastrop Loan, Inc.,* 407 F. Supp. 773, 781-82 (W.D. La. 1976); *Woods v. Beneficial Finance Co.,* 395 F. Supp. 9, 16 (D. Or. 1975).

[5] The plaintiffs correctly note that the *St. Germain* court dealt with a case of the "involuntary prepayment" which may result from acceleration of a contract providing for a fixed finance charge while in the instant suit the creditors use the "United States Rule" of computing interest. However, I do not think that this alters the result. Acceleration will, even under these facts, change the finance charge from the amount disclosed on the disclosure statement.

FRB STAFF LETTER NO. 829
AUGUST 22, 1974,
CCH CONSUMER CREDIT GUIDE ¶31,151

This is in response to your letter of July 25, inquiring whether a creditor who discloses a security interest in *all* after-acquired property may rely on the description of a security interest in Exhibit E of Federal Reserve Board publication, "What You Ought to Know About Truth in Lending," to provide a good defense under § 130 (c) of the Truth in Lending Act as a bona fide error, *when the appropriate State law only allows a creditor to acquire a security interest in consumer goods (other than accessions) when given as additional security if the debtor acquires rights in them within 10 days after the secured party gives value (UCC § 9-204).*

The sample forms found in this Board publication are intended solely for the purposes of demonstration for the type of credit extended in that particular example. *When drawing up his disclosure forms, each creditor must insure that all information disclosed is accurate according to the law of the jurisdiction in which the disclosure form is to be used.* Section 226.8 (b) (5) [§ 3566] of Regulation Z requires only that a description of identification of the type of any security interest held or to be retained or acquired by the creditor be disclosed. *The description of that security interest should accurately reflect the type of security interest that may be legally acquired under the appropriate State law.*

As the disclaimer following Exhibit E notes, the forms in the Board's publication are not necessarily definitive or accurate for every credit transaction; and it would not be, in staff's opinion, a bona fide error to rely on the description of a hypothetical security interest in an example when drawng up forms which should accurately describe a security interest to be taken in another transaction. Certainly, *it would not appear that the creditor could legally require a greater security interest in the debtor's property than permitted by State law*

merely by listing a greater secrurity interest in the Truth in Lending disclosure statement.

Your reference to § 226.6 (c) which states that any additional information supplied with any disclosure must not be misleading or confusing, would not seem to be applicable in this case; rather *it would seem to be a situation where there has been an inadequate description or identification of the type of security interest held or to be retained under the specific disclosure sections of Regulation Z.* (Emphasis added)

FRB STAFF LETTER NO. 983,
DECEMBER 30, 1975,
CCH CONSUMER CREDIT GUIDE ¶31,323

This is in response to your letter * * * and your previous correspondence concerning Public Information Letter 829. Specifically, you question the conclusions stated in that letter as to the proper disclosure of a security interest in after-acquired property under §226.8 (b) (5) [¶ 3566] of Regulation Z.

Letter 829 addressed the situation in which a creditor discloses a security interest in all after-acquired property when the relevant State law only permits the acquisition of a security interest in those consumer goods in which the debtor acquires rights within 10 days after the secured party gives value. This limitation is found in §9-204 of the Uniform Commercial Code, which is in effect in 49 states. The inquiring creditor had based this disclosure of the security interest description contained in Exhibit E of the Board's pamphlet *What You Ought to Know About Truth in Lending* and questioned whether reliance on the form would constitute a defense against civil liability under section 130 (c) of the Act. *Staff's response indicated that the description of the security interest must accurately reflect the type of security interest that may be validly acquired under State law, in order to comply with* § 226.8 (b) (5). Letter 829 has been interpreted to

require that the 10-day limitation on after-acquired property be included in the security interest disclosure under that section.

Upon further consideration of that letter, staff believes that, to the extent that it would require a creditor to disclose limitations on after-acquired property, Letter 829 should be modified. In staff's opinion, it would be sufficient, in disclosing an after-acquired property clause under § 226.8 (b) (5), to state simply that the security interest covered such property, without further describing the manner and conditions under which the interest attaches. We believe that this would comply with the relevant provisions in that section, which requires the creditor to clearly set forth the fact that after-acquired property will be subject to the security interest.

It must be emphasized, however, that staff's position on this issue rests not on Exhibit E of the pamphlet but on Regulation Z itself. As indicated in Letter 829, we do not believe that a creditor can automatically comply with the Regulation by using a sample form, regardless of whether the terms of the creditor's own credit plan coincide with those described in that form. For example, if a creditor discloses that the Rule of 78's will be used to compute finance charge rebates and State law does not permit the use of that rebate method in that type of credit transaction, this disclosure would clearly violate § 226. 8 (b) (7), despite the fact that the creditor's disclosure exactly mirrors the language of Exhibit E.

Thus, we believe that Letter 829 is correct in stating that the forms found in the pamphlet, are "not necessarily definitive or accurate for every credit transaction." Creditors must consider their own particular credit plans in light of the requirements of Regulation Z and design their disclosures accordingly. (Emphasis added)

FRB STAFF LETTER NO. 1053, MAY 28, 1976, CCH CONSUMER CREDIT GUIDE ¶31,393

You stated that certain retail installment contracts indicate that the creditor is reserving an interest in all after-acquired property including all attachments, substitutions, and replacements, without any indication of the limitations imposed by § 9-204. You ask whether this would constitute a violation of either § 226.6 (c) [¶3542] or § 226.8 (b) (5) of the Regulations.

It appears from your letter that these creditors are disclosing a security interest in "all after-acquired property including all attachments, substitutions, and replacements." If, in fact, the applicable State law only permits acquisition of a security interest in after-acquired property acquired within a certain period of time, then such a statement would be improper under Regulation Z. As our previous letter indicates, a simple disclosure of the fact that after-acquired property *may be subject* to the security interest would be sufficient to comply with the clear language of § 226.8 (b) (5), without an explanation of the various conditions and limitations on such interests which may be imposed by the applicalbe State law. *However, the fact that the creditor need not disclose such limitations and conditions does not means that the creditor may affirmatively misstate the scope of the security interest, in disregard of those limitations. If, in fact, the creditor discloses an interest in "all after-acquired property," when the interest would actually attach only to property acquired by the borrower within a certain period of time, such a disclosure would be inaccurate and misleading in violation of* Regulation Z. (Emphasis added)

FRB OFFICIAL STAFF INTERPRETATION, NOVEMBER 22, 1976, EFFECTIVE NOVEMBER 30, 1976, NO. FC-0023, 41 F.R. 52980, By JERAULD C. KLUCKMAN, Assistant Director, CCH CONSUMER CREDIT GUIDE ¶31, 491

This is in response to your letter * * * requesting an official interpretation on the disclosure of the type of a security interest under § 226.8 (b) (5) [¶3531] of Regulation Z.

Section 226.8 (b) (5) of Regulation Z requires the creditor to disclose, among other things, the "type of any security interest held or to be retained or acquired by the creditor." You submit three phrases which are intended to describe the type of a security interest taken by the creditor and request staff's opinion as to whether each of these phrases constitutes a sufficient description of the security interest under § 226.8 (b) (5).

First, you ask whether the disclosure of a "security interest under the Uniform Commercial Code" is a sufficient description when the creditor obtains a security interest subject to the UCC. In staff's opinion, this language would be sufficient to comply with the requirement of § 226.8 (b) (5) in the situation you describe. Staff believes that this provision of the Regulation does not require creditors to provide a detailed statement of the type of interest acquired or a citation to any specific statutory provision pursuant to which the security interest is obtained. In staff's view, a security interest under the Uniform Commercial Code is a "type" of security interest and may be adequately described using the language you suggest.

Additionally, you asked whether a concensual or contractual security interest may be disclosed in language such as the following: "a security interest established by our contract" or "a security interest through our agreement." In staff's opinion, this language does not adequately describe the type of security interest taken, pursuant to § 226.8 (b) (5). The words "contract" and "our agreement" may not convey any

particular meaning to the customer or assist him in identifying the legal document from which the security interest arises. However, if the language you propose could be modified to more specifically identify the contract or agreement referred to, staff believes that such a disclosure would adequately describe the type of security interest involved. For example, the statement might refer to the specific title of the document which evidences the security interest.

This is an official staff interpretation on Regulation Z issued pursuant to § 226.8 (d) (3) [¶3504] of the Regulation. Staff's conclusions relate solely to the facts and issues presented.